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HINDU LAW AND ITS INFLUENCE

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In the world-wide changes which will follow the Great War no permanent settlement can be hoped for or achieved which does not take into account the aspirations and dormant power of the teeming millions of the East. For too long a time we have accepted the opinion of those who hold that there can never be unity of thought and action between the Orient and the Occident; that "East is East, and West is West, and never the twain shall meet," instead of resolutely endeavoring to create a mutual and more sympathetic understanding. There are many modern and progressive ideas which Orientals must ultimately accept from us, but in order to arouse and foster a receptive spirit we must first recognize their high mental capacity and pay our tribute to that ancient wisdom which led the way from barbarism to settled government, and established the reign of law. When Britons roamed their forests clad in garments of skin and Teutonic tribes were concerned with little save war and tumult, the East had its legal systems, which were at once the product and the proof of a high civilization.¹ Of these the most notable was that of the Brahmins, which regulated a vast territory and, with later additions, still governs the family relations of over two hundred millions of people.² Its

¹ These consisted of the Code of Hammurabi, the Levitical laws, and the Code of Manu. In ancient Egypt

"as almost all serious disputes arose either about land and water, or about the impaired efficiency or contentment of this or that cultivator—there being nothing else to quarrel about—justice was administered by the chief man of the district, well acquainted with local custom . . . Hence Egypt never felt the need of a general code of law." J. L. Myres, *The Dawn of History*, 72.

² Various widely conflicting dates have been assigned for the compilation known as the *Manava Dharma Sastra*, or Laws of Manu. Gibelin in 1 *Etudes*

study is the one great avenue to a knowledge of Eastern thought, showing us both its strength and weakness, and revealing our indebtedness to ancient Aryan customs and a great religious caste for many important legal institutions.

Like the laws of Hummurabi and of Moses, all Hindu jurisprudence is held to be the revealed will of the Omnipotent.³ Thus to the Creator is ascribed the formation of the constitution and the division of the people into four great classes. "From the mouth of Brahma proceeded the *Brahmanas*," the highest or priestly caste, together with the Vedas or sacred books which it was their duty to expound; "from his arms *Kshatriyas* sprung," second in rank, charged with the duty of bearing arms and the defense of the faithful; "from his thigh *Vaisyas*," esteemed third in honor and intrusted with the economic duties of commerce and of agriculture; last and lowliest "from his foot *Sudras* were produced," to perform servile attendance upon the higher orders; all of these "with their females." Members of the three first castes, being of the fair-skinned Aryan stock, were entitled to participate in all Vedic worship and sacrifices; to the *Kshatriyas* was allowed the *Rakshasa*,⁴ or marriage by capture, which was imitated by the Romans in their rape of the Sabines, but the swarthy *Sudras*, composed of the alien peoples who had been conquered in the descent from the northern mountains to the southern plains, were excluded from intermarriage with members of the higher castes, and from all sacred worship whatsoever. Dire was the penalty if one overheard even by accident a Brahmin chanting his devotions.⁵ Each class acknowledged

sur le droit civil des Hindous, x, says that after transmission from age to age by oral tradition, they were reduced to writing in the thirteenth century before our era; this is also the opinion of Sir William Jones. Schlegel places the antiquity of the code at about ten centuries before Christ; Professor Wilson thinks it appeared about the end of the third or commencement of the second century B. C., while other authorities give it a later date. There is, however, a consensus of opinion that the Book of Manu embodies many Hindu customs dating back to remote times, and Vrihaspati declares that it expresses "the whole sense of the Veda." Other works attributed to various ancient sages were added to that of Manu, and form the Institutes of the Sacred Law which were accepted by the British Government after the conquest as authoritative and to be followed in all matters in which Hindus were concerned. Some changes have since been made, notably in criminal law, civil procedure, evidence and contracts, but the old laws and customs regulating family relations, etc., are still in force. See Bryce, *Studies in History and Jurisprudence*, 97-113.

³ I Colebrooke, *Digest of Hindu Law* (3d ed.) 12, n.

⁴ This form of marriage is now obsolete, and would in the present day be dealt with by the criminal law. Trevelyan, *Hindu Law*, 52.

⁵ Should a Sudra dare raise his eyes to an Aryan woman, the law declared that he might be slain or mutilated. If he listened to a recitation of the Vedic texts, his ears were to be filled with molten lac or tin; if he repeated the sacred words his tongue was to be cut out; if he remembered them, "his body shall be split in twain." Fraser, *A Literary History of India*, 153, citing Gautama, xii, 6.

the superiority of the one above it; "Kshatras bowed to holy Brahmins, and Vaisyas to the Kshatras bowed,"⁶ while the penalty of illicit marriages between members of a higher order and those of a lower one was loss of status to the offspring, this giving rise to a multitude of new and inferior castes. "Those races," declares Manu, "which originate in the confusion of the castes, and have been described according to their fathers and mothers, may be known by their occupations."⁷ As a gardener protects his choice varieties from admixture with inferior strains, so the Brahmins sought to maintain untainted their class distinctions. Travel beyond "the sacrificial country" into foreign lands was forbidden to the three first castes⁸ in order to prevent the contaminating influence of alien thought and of pollution through mere contact with men outside the pale, who were considered as unclean and degraded. "He commits sin through his feet who travels to the country of the Kalingas."⁹ In vain the Buddhists strove to break through these great barriers which separated race from race and caste from caste, upon which the Aryans relied for the continuation of their power. "No pride of conquering race, or pride of white-skinned birth could run higher than it did in India two thousand years ago."¹⁰

Such was the organization of the great Brahminic stronghold, self-centered and exclusive, foredoomed to decay because it shut out all new light and barred the path to progress. At one time there was grave danger that its doctrine of the divine distinction of classes would dominate the West, for it was accepted by both the founders of Greece and of Rome. The latter placed the plebeians, conquered and alien, in exactly the same position as the Indian Sudras. They had no political rights,¹¹ were forbidden to intermarry with patricians, and were denied the *jus sacrum*.¹² Had the plebs been contented to accept this abasement as the will of Heaven their position would have remained as hopeless as that of the Sudras, but they rejected the idea that God

⁶ *The Ramayana* (transl. by Romesh C. Dutt) bk. 1, pt. 1.

⁷ "The caste system in the present day very largely turns on occupation, and the tendency is to form smaller and smaller endogamous groups . . . Below the high castes there is an immense array of lower castes. The census enumerates over 2300 minor castes." Holderness, *Peoples & Problems of India*, 96-99.

⁸ The Sudra in quest of a living might adopt any country as his own. 5 *Sacred Books of the East*, 33.

⁹ *Ibid.* 260. "Down to to-day no Brahman can dwell among the nations of the West without risk of forfeiting his social rank, or without being obliged to perform costly and irksome penances on his return home." Fraser, 156.

¹⁰ Fraser, 153.

¹¹ 1 Maynz, *Cours de droit Romain*, 21.

¹² "The religion of Rome was intimately connected with the civil polity . . . The mere fact of birth in one of the *familiae* forming part of a *gens* gave admittance to a sacred circle which was closed to all besides." Sandars, *The Institutes of Justinian* (8th ed.) x.

had ordained some to be born to perpetual power and others to everlasting subjection. They came to look upon class distinction as a very human institution, and as such, subject to criticism and to change. After a long and bitter struggle their contentions prevailed and doors were opened for the advancement of the ambitious. During the feudal period the struggle to maintain distinctions of rank was renewed throughout Europe, and we still have the caste of royalty, as well as legislative bodies whose members owe their privileges to the accident of birth, but the Eastern doctrine of divine appointment has been replaced in the West by the maxim *vox populi, vox dei*.

The Hindu sages were not unmindful of the fact that superior station, coupled with great power, ever go hand in hand with oppression and injustice, but these evils they believed had been overcome, and the rights of the humblest protected by divine care, for

"God, having created the four classes, had not yet completed his work; but, in addition to it, lest the royal and military class should become insupportable through their power and ferocity, he produced the transcendent body of law; since law is the king of kings, far more powerful and rigid than they; nothing can be mightier than law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong."¹³

In these Sacred Institutions man is revealed as a lost soul and all his efforts here are to be directed to his future redemption. He has been cast down from Heaven and must strive to regain his place on High. Without thought of personal pleasure or power or glory, every moment of his earthly life must be centered on this great aim, which is his debt here below. Only, because one span of human existence is too short, it is impossible to pay it in full. But what a man cannot accomplish in his lifetime, his descendants by the continuity of their sacrifices may achieve for him after death, and three generations are necessary to attain this desired end. The prayers and offerings of those left behind assist him in his upward progression, and lead him at last to immortality.¹⁴ "As the suspended water-pot matures the *pippala* tree, so a father, a grandfather, and a great-grandfather cherish a son from the moment of his birth."¹⁵ No principle has so

¹³ *Gloss of Sancara on the Veda* (transl. by Sir William Jones), cited in 1 Colebrooke, *Digest of Hindu Law*, xiv.

¹⁴ 1 Gibelin, xxi. "The Hindu law imposes upon a son and grandson the duty of paying the debts of his father and paternal grandfather from whom he has not separated, provided they have not been incurred for immoral or illegal purposes, or are barred by the law of limitation. As, according to Hindu ideas a man and his three male paternal ancestors are the same person in different bodies, there would be a similar liability to pay the debts of a great-grandfather, but by a special rule of limitation the liability does not extend beyond the grandson." Trevelyan, 294, citing, 1 Colebrooke, *Digest*, 267, 334.

¹⁵ *Digest of Hindu Law*, bk. 5, ch. 2, § 80.

affected the progress of the East as this strange doctrine inculcated by the Brahmins under supposed divine inspiration. To ensure the necessary male descendants to assist in the salvation of ancestors it became necessary to encourage child marriages, to sanction the legal fiction that a son adopted was a real son, and to legalize polygamy.

The same cause, however, led to a nobler result—the elevation of marriage to a sacrament, and its recognition as the union of two persons for the purpose of carrying out the divine mission. The great epic of *Rama*, treasured and revered by each successive generation of Hindus, gives a delightfully vivid account of the Brahminic rites.¹⁶ These were most impressive: the bridal couple stood within the sacred ring, the father gave away the bride, the holy water was sprinkled upon “the blest and wedded pair.” Then the future consorts verbally plighted their troth, holy texts were recited, hand in hand they walked around the sacred fire, and on taking the seventh step they became husband and wife. To western ears there is a familiar sound in the words spoken by Janak as he gave his daughter to Rama to be “of his weal and woe partaker,” to be cherished by him “in joy and sorrow,” and to remain steadfast to him unto death. Then, as with us, there was a wedding feast to which kinsmen and friends were invited, gifts were bestowed, “bright Gandharvas skilled in music waked the sweet celestial song,” and flowers were thrown upon the happy pair. There is evidence that these marriage rites were transmitted through Greece to Rome, for a passage in the *Digest* of Justinian shows that at one time the acceptance of the bride by water and by fire was customary.¹⁷ On the fifth day after the birth of a child the rite of purification was performed. A woman took the babe in her arms, and followed by all the occupants of the house, walked several times around the fire which burned on the altar—a practice which was also adopted by the Greeks. In both nations, from the tenth to the twelfth day in India and between the seventh and the tenth day in Greece, they proceeded with the same solemnity to give a name to the child in the presence of friends and kinsmen. The father’s declaration was accompanied by a sacrifice, followed by a feast.¹⁸ All this is very like our modern ceremonies of baptism and christening.

If there was no male issue, woeful was the result, for “‘heaven is not for him who leaves no male progeny.’ Enemies therefore pronounce this curse, ‘May they be childless, and become evil spirits!’”¹⁹ For this reason Manu decreed that “a barren wife may be superseded

¹⁶ *Ramayana*, bk. 1, pt. vi. See also *Digest of Hindu Law*, bk. 4, ch. 4, §§ 166, 174, 175.

¹⁷ *Virgini in hortos deductae die nuptiarum priusquam ad eum transiret et priusquam aqua et igne acciperetur id est nuptiae celebrantur . . . obtulit dicem aureos dono.* *Dig. leg.* 66, 1, *de don. int. vir et ux.*

¹⁸ 1 Gibelin, 51.

¹⁹ *Digest of Hindu Law*, bk. 5, ch. 4, § 311.

by another in the eighth year; she whose children are all dead, in the tenth; she who brings forth only daughters, in the eleventh."²⁰ It was only upon such failure of the heir so necessary to future salvation that in the early days the husband of a virtuous woman was allowed to take a second wife, for the first Hindu lawgiver expressly ordains "let not a man contract another marriage, unless he do so on the loss of his wife or son,"²¹ but "let mutual fidelity continue till death:" this, in few words, may be considered as the supreme law between husband and wife."²² Later sages recognized plural marriages, which are still lawful,²³ and a Hindu may at his pleasure marry any number of wives, although he has a wife or wives living, but the ardent desire of the early Brahmins to foster monogamy is shown by their provision for the relief of childless persons by the recognition of twelve different kinds of sons, and their eager acceptance of the fiction that a son adopted becomes as a real son, and his funeral offerings are just as efficacious for salvation.²⁴ Certain conditions were prescribed for its validity.²⁵ The child adopted must not be of another primary caste, nor of the female sex, nor have been marked for his own family through the ceremony of tonsure, nor be an only son,²⁶ since in the latter case he was charged with the obligation of rescuing his own ancestors, nor could a woman take to herself a child in adoption. The ceremony of initiation was public and sacramental. "He who means to adopt a son, must assemble his kinsmen, give humble notice to the king, and then, having made an oblation to fire with words from the Veda, in the midst of his dwelling house, he may receive, as his son by adoption, a boy, nearly allied to him, or, on failure of such, even one remotely allied."²⁷ The ceremony of tonsure

²⁰ *Ibid.* bk. 4, ch. 1, § 70.

²¹ *Ibid.* § 71.

²² *Ibid.* bk. 4, ch. 4, § 190.

²³ A Hindu at his pleasure may marry any number of wives, although he has a wife or wives living. Trevelyan, 32. The restriction as to number of wives among the Mahomedans of India has its origin in Hebrew custom, Mahomet having been guided on this question by the decision of Jewish doctors. Sale, *Preliminary Discourse on the Koran*, s. vi.

²⁴ "A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name." *Digest of Hindu Law*, bk. 5, ch. 4, § 312.

²⁵ *Ibid.* §§ 183, 273.

²⁶ The question as to whether the precept prohibiting the adoption of an only son was a moral injunction or a positive law was long disputed, but was settled in 1899 when the Judicial Committee of the Privy Council, in the case of *Sri Balusu Gurulingaswami v. Ramalakshamma*, L. R. 26 Indian App. 113, held that it was only directory.

²⁷ *Digest of Hindu Law*, bk. 5, ch. 4, § 273. The text which prescribes the adoption of a *sapinda*, or relative, is only a religious injunction, but the prohibitions as to difference of caste and as to adoption by women have been held to be positive laws. See Trevelyan, 107, 132, 133, and cases there cited.

completed his dedication to his new family.²⁸ It is interesting to note the wide influence of these provisions of the Hindu law. They spread to China where the continuity of the family is also held to be of supreme importance and the same preference for the children of kinsmen is declared,²⁹ and through China to Japan.³⁰ Greece adopted them also from a belief in the same imperative need of a father "to have a son to perform at the tomb the sacred ceremonies, perpetuate his race, and transmit his name by an uninterrupted chain of descendants, and so confer upon him immortality." The Franks must have been cognizant of the Hindu institution and the rites accompanying it, for Luitprand in adopting Pepin performed the ceremony of tonsure,³¹ and there is absolute evidence that the Hindu law was the foundation of the Roman law of adoption, through which it has become a part of the civil law of Europe. The custom prevailed among the Babylonians in the time of Hammurabi but was entirely different in its nature and effects. It was not the unbreakable tie of the Hindus, and provision was made for a return of the adopted boy to his father's house if he proved rebellious, if his adopter did not teach him his handicraft, or if he failed to reckon him among his sons;³² whereas in Rome, as in India, an adopted son became as a son born in marriage, women could not adopt,³³ and the arrogation of those *sui juris* was of a public character. It was considered a matter of public policy to keep a watch over such a proceeding lest the last of his *gens* should arrogate himself and its *sacra* be lost, and the approval of the *comitia curiata* was never granted if there was any likelihood of the sacred rites of the family of the person to be adopted becoming extinct by his departure from it.³⁴ Still stronger proof of Hindu origin is afforded by the peculiar provision of the Roman law which allowed a man to adopt a grandchild by an undetermined son (*nepos quasi ex filio incerto*), the reason for which has given rise to much speculation among commentators. Professor Maynz thought it might be found in the difference which existed between the legal position of a son and grandson, but he admits that these differences were so unimportant in the time of the classic jurists that they do not suffice to explain in a satisfactory manner the maintenance of the custom.³⁵ A similar provision, however, may be found in the Code of Manu to meet the case of a man who had a daughter, but no son. Under such circumstances the father might provide for the necessary male

²⁸ *Digest of Hindu Law*, bk. 5, ch. 4, § 182.

²⁹ Alabaster, *Notes & Commentaries on Chinese Criminal Law*, 168.

³⁰ The laws of Iyeyas, Dickson, *Japan*, 202.

³¹ Michelet, *Origines du droit français*, 11-13.

³² *Code of Hammurabi* (transl. by Harper) art. 186, 189, 190.

³³ *Feminae nullo modo adoptare possunt*, Gaius, 1, 104.

³⁴ Sandars, *Institutes of Justinian*, xi, 41.

³⁵ 3 Maynz, 88, 22, n.

descendant by declaring that he adopted as his own son the child which might be born to his daughter when she married. "He who has no son may appoint his daughter in this manner to raise up a son for him, saying: 'the male child who shall be born from her in wedlock, shall be mine for the purpose of performing my obsequies.'"³⁶ Here we have the parallel case of the adoption of a child by a son as yet unknown, which seems to establish beyond doubt the origin of a custom so peculiar and artificial.

Another device for the assurance of male representatives was the practice of *niyoga*, by which a kinsman was appointed to raise up issue by the wife of a childless husband, or of one deceased without leaving sons. Mr. Iyer is of opinion that this was a custom prevalent among the aborigines of India at the time of the Aryan invasion, and therefore of great antiquity.³⁷ The Brahmins regarded this form of sonship as immoral, but it had taken such deep root in the conquered territory that they were compelled not only to recognize it, but to enforce it. The Levirate law also decreed this form of union in the case of childless widows "in order," says Josephus, "that families may not fail and the estate may continue among the kindred."³⁸ The Hebrews, however, did not sanction the appointment of a brother during the lifetime of the husband, and the Greek law of Solon³⁹ permitting this practice seems therefore to be of Indian origin. So strong was the opposition of the priestly Hindu caste to *niyoga* that the custom gradually declined, and has long been obsolete in India except among the Jats and the Lohd caste in the northwest. This result redounds to the honor of the Brahmins, who, though desiring above all things to ensure male representation of each family, scorned a practice which appealed to them as unworthy.

With the assurance of one degree of male descent the Hindu father had performed only his first duty. The next was to secure the necessary grandson, and this impelling cause led to that custom of child marriage which has had such a blighting effect upon India. The evils arising from the union of young boys and girls were never contemplated by the law of Manu, which contains provisions directed to the perpetuation of a race endowed with the highest physical and moral qualities. To ensure mental excellence, men of the higher ranks were enjoined to espouse only women of the same caste as them-

³⁶ *Digest of Hindu Law*, bk. 5, ch. 4, § 212.

³⁷ Iyer, *Hindu Law*, 34. The practice is referred to in the *Ramayana*, bk. vi, pt. iv, where Sita charges Lakshman with looking upon his brother Rama's danger "with a cold and callous heart," and asks "Seest thou the death of elder to enforce his widow's hand?"

³⁸ Josephus, *Antiquities of the Jews* (transl. by Whiston) bk. iv, ch. 8. In China a man may not marry his deceased brother's wife under penalty of death. Alabaster, 179.

³⁹ *Plutarch's Lives*, Solon.

selves, a spirit of religious reverence was fostered by the denial of selection from any family which omitted prescribed acts of religion or in which the Veda had not been read, while the physical requirements were the strictest known to any system of law. Not only must there be freedom from any hereditary disease; there must be perfection of form and of disposition to a degree bordering upon the impossible. The bride must not be "very fat or very lean, nor very tall nor very short," nor must she be older than the bridegroom. Further, says Manu, "let him not marry a girl with reddish hair, . . . nor one immoderately talkative."⁴⁰ As to the future husband, "It is better that the damsel, though marriageable, should stay at home till her death, than that he [her father] should ever give her to a bridegroom void of excellent qualities."⁴¹

If a father learned after marriage that he had been deceived as to the essential qualities of the bridegroom, the law provided a remedy. "From a man of contemptible birth, from an eunuch or the like, from a degraded man, from one afflicted with epilepsy, vicious, or tainted with shocking diseases, . . . a parent may take back a damsel, though given away; and so may he one married to a man known from his family name to be sprung from the same primitive stock."⁴² On the other hand, "if a man give a faulty damsel in marriage, without disclosing her blemish, the husband may annul that act of her ill-minded giver."⁴³ Fraud and lack of free consent also gave rise to a right of annulment. According to Vasishta,⁴⁴ "If a damsel has been abducted by force, and not been wedded with sacred texts, she may lawfully be given to another man." The decrees of the ancient sages as to moral and physical fitness are now held to be merely directory, and not to possess the force of legal injunctions.⁴⁵ Owing to later custom which regards the marriage of every person as imperative, whatever his defects, the Hindu writers greatly restricted the causes for pronouncing invalid a union which has been completed by the *saptapathi*.⁴⁶ In the case of *Dabychurn Mitter v. Radachurn Mitter*,⁴⁷ the first question put to the Pundits by the Calcutta Supreme Court was "By the Hindu law, is the marriage of a lunatic by consent of his family, binding?" The answer was: "The marriage of a lunatic a

⁴⁰ *Digest of Hindu Law*, bk. 4, ch. 4, § 185.

⁴¹ *Ibid.* § 179.

⁴² *Ibid.* § 178.

⁴³ *Ibid.* § 184.

⁴⁴ 14 *Sacred Books of the East*, 92.

⁴⁵ Iyer, 438.

⁴⁶ *Ibid.* 436. The *saptapathi* is the seventh step around the sacred fire.

⁴⁷ (1817) 2 Morley's Dig. 99. Unsoundness of mind does not invalidate a marriage, says Trevelyan (p. 30) and he cites the *dictum* of the Judicial Committee of the Privy Council in *Mouji Lal v. Chandrabati Kumari* (1911) L. R. 38 Indian App. 122, 125: "To put it at the highest, the objection to a marriage on the ground of mental incapacity must depend on a question of degree."

nativiti is immoral, but valid with the consent of parents. The marriage of one who becomes a lunatic after his birth and during his lunacy is valid." The court relying upon this opinion gave judgment accordingly. Although there have been no decided cases, it is believed that persons suffering from any physical disability, no matter how serious, would also be held competent to marry,⁴⁸ but fraud and force,⁴⁹ marriage within the prohibited degrees,⁵⁰ and marriage out of primary caste,⁵¹ are still considered as insuperable obstacles. If a Hindu marries abroad, however, he cannot invoke the law as to caste to invalidate his action, and the union is regarded as binding both in the country of celebration and in India.⁵² It is apparent that the intense desire that every person should have offspring caused a regrettable departure from the ancient law of Manu, which contained principles of prohibition which have found acceptance, with modifications suited to time and place, in many modern codes and systems.

India also affords the noblest example of those domestic communities which form so striking a feature of early law. The power of the Hindu father as head of the household was not the unbridled, tyrannic sway of the Roman *pater-familias*, but the benignant control of a person in whom the great trust was reposed of raising a family worthy to perform the sacrifices needed for redemption. If he alone directed, it was because experience had brought him greater wisdom; his hand was raised, not in anger, but to remedy some defect. His duties were as great as his rights, and stern was the punishment both here and hereafter if he failed to clothe and nourish his dependents. "The ample support of those who are entitled to maintenance, is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care," says Manu.⁵³ If he illtreated his wife or daughters beyond endurance, they might invoke a curse upon him, and "on whatever houses the women of a family, not being duly honoured, pronounced an imprecation, those houses, with all that belong to them, utterly perish."⁵⁴ All the property of the community must be used for the common good. If a husband consumed the property of his wife against her consent, he was compelled to pay interest to her and a fine to the king,⁵⁵ and it was only at a time of distress, for the support of his household or for the performance of

⁴⁸ Iyer, 437.

⁴⁹ Trevelyan, 47.

⁵⁰ *Ibid.* 42.

⁵¹ Trevelyan, 34, and authorities there cited. But marriage between persons belonging to different subdivisions of the same primary caste is valid. *Ramani Ammal v. Kulanthai Natchear* (1871) 14 Moore Indian App. 346.

⁵² *Chetti v. Chetti* [1909] p. 67. And see Iyer, 404, 408.

⁵³ *Digest of Hindu Law*, bk. 2, ch. 4, § 11.

⁵⁴ *Ibid.* bk. 4, ch. 1, § 39.

⁵⁵ *Ibid.* bk. 2, ch. 4, § 10.

religious duties, that he could mortgage or sell any of the immovable property.⁵⁶ Nor could he even dispose of movables until the necessities of his wife and children were provided for. "The giver of more, who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison."⁵⁷ Over his sons he had almost complete control, but not that absolute power vested in the early Roman *pater*. Under both systems the son, whatever his age and even if married, was in a state of perpetual tutelage, and parental control ceased only on the natural or civil death of the father, his becoming incapable of administering his affairs, or by voluntary emancipation. In Rome at the time of the Twelve Table (No. 4), a father might sell his children or expose them or even put them to death, but time ameliorated this condition until, like the Hindu father, he was restricted to a right of mild correction and could sell his offspring only in cases of extreme necessity in order to save both from privation.⁵⁸ Here the parallel ceases, for the Roman *pater* could dispose of all the earnings and property of a son as he pleased, whereas there was certain ancestral property in which the son inherited a joint interest which the Hindu father could not alienate.⁵⁹ Moreover, the moral training of his boys which the Roman father might neglect without fear, was to the Hindu a matter of supreme importance. In the person of his offspring he was enjoined "figuratively [to] address his own soul."⁶⁰ The child was considered as part of himself. If his son proved worthy, great was the father's reward in the hereafter.

"He who has a son pure, capable and virtuous in the first period of life, and perfected by the correction of his own defects, transports his ancestors over the abyss of death,"⁶¹ but if the boy became degraded, terrible was the result.

"As a man would be drowned who attempted to pass deep water in a boat made of woven reeds, so does a father sink in the gloom of death, who leaves only contemptible sons."⁶²

This Brahminic doctrine that the sins of the children are visited upon the fathers stands alone in its compelling responsibility for their proper upbringing.

The Hindu parent might also inflict corporal chastisement on his wife or daughters, but as in the case of the son, the instruments of punishment were limited to "a rope or small shoot of cane"⁶³ applied

⁵⁶ *Ibid.* § 55.

⁵⁷ *Ibid.* § 18.

⁵⁸ Sandars, 29.

⁵⁹ *Digest of Hindu Law*, bk. 2, ch. 4, § 31.

⁶⁰ *Ibid.* bk. 5, ch. 4, § 197.

⁶¹ *Ibid.* § 307.

⁶² *Ibid.* bk. 5, ch. 5, § 314.

⁶³ *Ibid.* bk. 3, ch. 1, § 11.

on the back above the waist. Furthermore, by a maxim of almost universal acceptance he was abjured to "strike not, even with a blossom, a wife guilty of a hundred faults."⁶⁴ But although women must be treated with kindness and consideration they were allowed no rights, "as the shadow to the substance, to her lord is faithful wife,"⁶⁵ and next to the evils of caste and the curse of child marriages, their subordinate position is the cause of the decadence of India. "A son is a light in heaven, a daughter but an object of compassion." At the birth of the latter there were no ceremonies with the recital of holy texts, and throughout their lives they were forbidden to study the Veda.⁶⁶ Nothing could be done according to their mere pleasure, and their smallest duties—even domestic ones—were prescribed by law. They were also doomed to perpetual tutelage, for in the estimation of the Hindu sages women and weakness were synonymous terms:

"In childhood must a female be dependent upon her father; in youth, on her husband; her lord being dead, on her son; if she have no sons, on the nearest kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign: a woman must never seek independence."⁶⁷

In this matter also Roman custom followed that of the Hindus. In Babylon during the period of Hammurabi great privileges had been granted to women, and in the commercial world they appear to have been on an equality with men, while the Romans, who drew so largely from India, through Greece, also adopted the principle of perpetual guardianship for women,⁶⁸ and it was not until after the time of Gaius that it disappeared and the equality of the sexes was conceded. This legal recognition of the rights of women, Rome was unable to transmit in its entirety. Both the canon law and the customary law for widely different reasons rejected equality, and as their influence proved the stronger upon the law of modern Europe, the wife was again placed in subjection; not to her blood relations but to her husband.⁶⁹ It is only in India that the system of constant guardianship survives,⁷⁰

⁶⁴ 2 *Ibid.* 4, n.

⁶⁵ *Ramayana*, bk. 1, pt. vi.

⁶⁶ *Digest of Hindu Law*, bk. 4, ch. 1, § 25.

⁶⁷ *Ibid.* § 86.

⁶⁸ Livy, bk. 34, ch. 2. *Majores nostri nullani, ne privatum quidem rem agere faeminas sine auctore, voluerunt: in manu esse parentum, fratrum, virorum.*

⁶⁹ Maine, *Ancient Law* (10th ed.) 154.

⁷⁰ From the western point of view the whole position of women in India is wrong. But the West is not the East, and the conservative Hindu will probably say that as things are in the East, the caste system with its doctrine that every woman should always be under male guardianship, makes for the security of the family. The perpetuation of the family and the purity of its blood are the root ideas of Hinduism. It is impossible to judge the institution of caste fairly unless the Hindu position is understood. Holderness, 104.

and we have also to look to the East for those special reasons for which a wife might be superseded or forsaken, which seem so frivolous and inadequate to western nations. To understand their origin and significance it must be borne in mind that the thought dominating the Brahmins is the detachment of the individual from the things of this world. The future of those who have died is the only interest worthy the attention of the living; to assure happiness in heaven the great and only duty. As the consorts are to dwell together in the eternal mansions, there must be no discord here below, and she who spoke unkindly to her husband might be superseded by another wife.⁷¹ Because the Deities will not admit a woman addicted to intoxicating liquors into the same abode with her lord, this is also a great offense.⁷² Disease, which is believed to be a punishment for some grave sin committed in a previous existence, was also a sufficient reason for supersession.⁷³ Barrenness, as a failure in the duty to provide the son necessary for salvation, entailed the same penalty,⁷⁴ while abortion, destroying all hope for the future, rendered the wife infamous.⁷⁵ Divorce is practically unknown to the Hindu law,⁷⁶ but for all the above reasons a man might take unto himself another wife.⁷⁷ The ancestral worship of the Chinese caused them to adopt these peculiar grounds in their entirety,⁷⁸ but as only one lawful wife is permitted in that country⁷⁹ the penalty was divorce and not supersession. The Hindu law forbidding a wife from beholding sports and dances or attending crowded spectacles or jubilees in the absence of her husband, is reflected in the present law of Greece, which, unchanged throughout the centuries, still allows a right of divorce to the man whose consort has without his knowledge attended races, theatres, or sports.⁸⁰ All

⁷¹ *Digest of Hindu Law*, bk. 4, ch. 1, § 70.

⁷² *Ibid.* bk. 4, ch. 1, § 68.

⁷³ *Ibid.* § 67.

⁷⁴ *Ibid.* § 70.

⁷⁵ *Ibid.* § 63.

⁷⁶ It is, however, allowed by custom in certain localities and among certain low castes. Trevelyan, 59. As to recognition of established customs contrary to the general law, the Judicial Committee of the Privy Council said:

"The duty of a European judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage." *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1868) 12 Moore Indian App. 397, 436.

⁷⁷ According to the Hindu law as now administered by courts, a Hindu may have as many wives as he chooses, and it is not necessary that before taking a second wife there should be any justifying cause referred to in the Sanskrit writings. Iyer, 413.

⁷⁸ Alabaster, 184.

⁷⁹ *Ibid.* 171.

⁸⁰ British Parl. Rep. on *Laws of Marriage & Divorce in Foreign Countries* (1892) pt. 2, p. 77.

ancient nations were agreed in regarding adultery as a heinous offense. If the wife of a Hindu proves unfaithful, "the honor of the family is forfeited, if that be lost the pure succession of progeny is lost; through that loss the sacraments of Deities and of manes are destroyed; these sacraments being destroyed duty fails; duty failing, the husband's soul is lost, and his soul being lost, everything is lost."⁸¹ Such a woman must either be forsaken or be subject to penance and mortification, but in an age when among other nations the penalty for this transgression was death in a cruel form, Manu ordained that she must neither be slain nor mutilated. If she remained in the same house with her husband it was a continuous penance, "her hair shall be shaved, she shall have to lie on a low couch, receive bad food and bad clothing, and the removal of the sweepings shall be assigned to her as her occupation."⁸² She can still claim shelter and what is known as "starving maintenance," that is, just sufficient food and raiment to support life.⁸³ In the case of *Honamma v. Timannabhat*,⁸⁴ the learned judges observed "the reason why bare food and raiment are directed by the Hindu sages to be given to an unchaste woman is that she may have a *locus penitentia* and that she may not be compelled by sheer necessity to live a life of shame and misery." A woman may, in turn, forsake a husband guilty of adultery or illtreatment, and in such case according to the texts she will be entitled to receive one-third of her husband's property for maintenance.⁸⁵ But, while her husband may marry as often as he pleases, the only ground upon which she can break a marriage tie and contract a second union is that of repudiation or desertion by her husband on account of her conversion to Christianity; then, by The Native Converts Dissolution Act of 1866 she is granted special rights of divorce and remarriage. In all other cases her only remedy is to obtain a decree for judicial separation.⁸⁶

Before the practice of *suttee* was abolished by the East India Company, the wife could assure her future happiness upon the death of her husband by ascending the same funeral pyre with his body. Moreover, by this act of devotion she expiated the sins of three generations on both the paternal and maternal sides of the family to which

⁸¹ *Digest of Hindu Law*, bk. 4, ch. 1, § 8.

⁸² 23 *Sacred Books of the East*, 183.

⁸³ The jurisprudence on this point is still unsettled, but in *Parami v. Mahadevi* (1909) I. L. R. 34 Bombay, 278, 283, it was said:

"A general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life he is bound to keep her in the house under restraint, and provide her with food and raiment just sufficient to support life. She is entitled to no other right."

⁸⁴ (1877) I. L. R. 1 Bombay, 559.

⁸⁵ Iyer, 543 and texts there cited.

⁸⁶ A Hindu woman who having a husband living, goes through a form of marriage with another, is guilty of bigamy, and punishable under section 494 of the Indian Penal Code.

she was united by marriage. Even though her consort had slain a priest, or returned evil for good, or killed an intimate friend, her sacrifice atoned for these crimes; "so does she draw her husband from hell and ascend to heaven by the power of devotion," there to remain in perfect bliss as long as fourteen Indras reign.⁸⁷ Chinese widows in order that they might not be separated from their dead husbands often followed the same course, but burning was replaced by a ceremonial hanging, which was usually graced by the attendance of a government official and the sacrifice commemorated by a monument erected at the public expense;⁸⁸ but the practice is declining. If the Hindu widow did not practice suttee, she was expected to remain faithful to her deceased husband and not to remarry. "Once is the partition of an inheritance made; once is a damsel given in marriage"⁸⁹ declares Manu, and this was the law at the commencement of British rule. By The Hindu Widow Remarriage Act, passed by the Legislative Council of India in 1856, all legal obstacles were removed and it was provided that

"no marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding."

The present existence of millions of child widows in India, however, shows how closely they still adhere to their ancient law.

In these provisions governing caste and family relations, founded upon peculiar religious beliefs, there is much that is altogether alien to Western minds, but when we turn to other departments of jurisprudence it at once becomes evident that the ancient lawgivers of India were both practical and scientific, and we begin to realize something of their wonderful mentality. Where their decrees are not based upon the law of nature they are inspired by the highest human wisdom. Their laws for the protection of the people against the greed or craft of unscrupulous traders remain a model for all time. Faced with present-day needs, the West has evolved nothing better in food control than the ancient practice of the Brahmins:

"Once in five nights, or at the close of every half month, or of every month, according to the nature of the commodities, let the king make a regulation for market prices, in the presence of those experienced men [the traders]."⁹⁰

⁸⁷ *Digest of Hindu Law*, bk. 4, ch. 3, §§ 123, 125.

⁸⁸ Douglas, *China*, 130 *et seq.*

⁸⁹ *Digest of Hindu Law*, bk. 5, ch. 5, § 252. There are, however, contradictory texts in Manu, but Yajñawalkya is most explicit in his prohibition. See Iyer, 411.

⁹⁰ *Digest of Hindu Law*, bk. 3, ch. 3, § 48.

"Adding the incidental charges to the first cost of the commodity, let a price be fixed that shall be equitable both to the buyer and the seller."⁹¹

In early Rome also, the state showed the greatest solicitude in the food supply of the people and by various measures kept the price of cereals at a low rate. Very often the government sold wheat below its cost price.⁹² They also, by the *lex Julia de Annona*, prohibited combinations for raising the market price of provisions, while in China it is decreed that any person who unduly depresses or raises prices to gain personal advantage incurs the penalty of eighty blows, and undue profit derived therefrom is treated as theft.⁹³ The Hindus grappled with the same problem and the sages ordained that:

"The fine on traders who combined to obtain or to vend goods at wrong prices, is fixed at the highest amercement."⁹⁴

"The highest amercement is directed for traders combining to maintain the price against labourers and artisans, although acquainted with the rise or fall of the price."⁹⁵

Just weight and measure must be given:

"He who falsifies scales, market rates, measures, or standard coins, and he who uses them, shall both be forced to pay the highest amercement."⁹⁶

"He who cheats in weights or measures to the amount of an eighth part, shall be forced to pay a fine of two hundred *panas*, and proportionably if the fraud be greater or less."⁹⁷

Pure food laws were also established:

"A man who adulterates vendible property, such as drugs, oil, salt, perfumes, grain, sugar, or the like, shall be compelled to pay sixteen *panas*."⁹⁸

Trade deception was a crime:

"The fine for disguising the nature of earth, leather, beads, thread, iron, wood, bark, and cloth, is eight times the amount of the sale."⁹⁹

Nor must there be concealment of defects in merchandise:

"The dishonest man, who sells a commodity knowing its blemish, but not disclosing it, shall pay double the price of it to the vendee, and a fine of equal amount to the king."¹⁰⁰

⁹¹ *Ibid.* § 50.

⁹² 1 Maynz, 91, 26, n, and laws there cited.

⁹³ Alabaster, 545.

⁹⁴ *Digest of Hindu Law*, bk. 3, ch. 3, § 46.

⁹⁵ *Ibid.* § 45.

⁹⁶ *Ibid.* § 39.

⁹⁷ *Ibid.* § 41.

⁹⁸ *Ibid.* § 42.

⁹⁹ *Ibid.* § 43.

¹⁰⁰ *Ibid.* § 31.

Nareda sums up the whole duty of a trader :

"Let him not act crookedly ; the straight path is the best in all mercantile business."¹⁰¹

In levying taxes for the purpose of raising revenue, the king is counselled by Manu to be just and moderate:¹⁰²

"2. After full consideration, let a king levy those taxes continually in his dominions, that both he and the merchant may receive a just compensation for their several acts.

"3. As the leech, the suckling calf, and the bee, take their natural food by little and little, thus must a king draw from his dominions an annual revenue."

"11. Let the king order a mere trifle to be paid, in the name of the annual tax, by the meaner inhabitants of his realm, who subsist by petty traffick."

"13. Let him not cut up his own root by taking no revenue, nor the root of other men by excess of covetousness ; for, by cutting up his own root and theirs he makes both himself and them wretched."

Parasara expresses the same idea :

"Let the king gather blossom after blossom, like the florist in the garden ; and not extirpate the plant, like a burner of charcoal."¹⁰³

In the endeavor to find a method of taxation which would be least burdensome, the Hindu sages adopted the plan of levying duties on inheritances, a means of obtaining revenue which has found great favor among modern nations. Vrihaspati says : "Let the king receive a sixth part from the property of a Sudra ; a ninth from that of a Vaisya, a twelfth from that of a Cshatriya, a twentieth from that of a Brahmana."¹⁰⁴ The Emperor Augustus, by the *lex Julia Vicesimaria*, imposed a tax of a similar nature on the estates of Roman citizens, and this indirectly led to the enfranchisement of all free subjects who were not citizens, for Caracalla, by his *Constitutio Antoniana*, granted rights of full citizenship to all inhabitants of the Empire, save those who were enslaved, in order to increase the number of persons whose estates were subject to succession duties.¹⁰⁵ With the added experience of centuries our legislators have been unable to improve upon many of the trade regulations and methods of taxation of the early Hindus.

To Manu also belongs the distinction of having first recognized that the loan of money at interest to whomsoever has need of it, or can usefully employ it, is a legitimate business resulting in a true economic

¹⁰¹ *Ibid.* § 38.

¹⁰² *Ibid.* bk. 2, ch. 2, § 14.

¹⁰³ *Ibid.* § 15.

¹⁰⁴ *Ibid.* bk. 2, ch. 3, § 22.

¹⁰⁵ 1 Maynz, 168.

product. This question formed the subject of grave controversy both in ancient times and during the Middle Ages. The Hebrews inhibited the lending of money at interest to brethren in distress, although permitting it as regards strangers,¹⁰⁶ and the Mahomedans made the same distinction between the faithful and unbelievers.¹⁰⁷ Even Rome for a long period forbade loans at interest between citizens,¹⁰⁸ and the great French jurists Domat and Pothier, basing their arguments on the Old Testament and the *Ordonnance de Blois*, thought that there should be no interest on the loan of money.¹⁰⁹ But Manu in the beginning took the modern view and included the lending of money at interest in his classification of the seven virtuous means of acquiring property.¹¹⁰

The system of granting prize-money in time of war was also in vogue among the Hindus, and a comparison of their regulations¹¹¹ with those of the French *Ordonnance sur la Marine* of 1681 shows an extraordinary similarity both in text and ideas:

Catyayana. "Of an enemy's property, brought from a foreign country by robbers commissioned by their lord, the king shall have a tenth part, and they shall divide the remainder by this rule: The leader of the robbers shall have four shares of it, the bravest of his men three, the most active two, the others equal shares."

Ordonnance sur la Marine, liv. 3, art. 52, tit. 9. "*Le dixieme des prises, est acquis et doit être delivré a l'amiral. Le chef a droit à un plus grand nombre de parts; il en est alloué aussi de plus fortes aux plus brave.*"

Catyayana. "If one of them when they set out on their adventure, should be taken prisoner, whatever he may give for his ransom, the rest shall pay equally with him."

Ordonnance, liv. 3, art. 17, tit. 4. "*Si un matelot est fait prisonnier pendant la campagne, son rachat est payé concurrement par tous.*"

The old Hindu law of contract, now superseded by the Indian Contract Act of 1872, lacked the scientific arrangement and completeness of the Roman law which, however, did not differ from it in essential particulars. In both countries the forms were much the same. The agreement must be either in writing or, if oral, made in the presence of witnesses. All the parties must be legally capable, and a contract made by a woman, minor, idiot or lunatic, or by a person intoxicated or acting without proper authority, was null. The use of force¹¹² or

¹⁰⁶ Exodus, 22, 25; Leviticus, 25, 27; Deuteronomy, 23, 19.

¹⁰⁷ Hedaya, bk. 16, ch. 8; Al Koran, ch. 2.

¹⁰⁸ Sandars, 325.

¹⁰⁹ 1 Gibelin, 196.

¹¹⁰ *Digest of Hindu Law*, bk. 2, ch. 4, § 20.

¹¹¹ *Ibid.* bk. 2, ch. 3, § 57.

¹¹² *Digest of Hindu Law*, bk. 2, ch. 2, p. 10. "What is given by force, what is by force enjoyed, by force caused to be written, and all other things done by force, Manu has pronounced void."

the existence of fear,¹¹³ error or fraud,¹¹⁴ also rendered it void, as did a consideration of an illegal nature. As regards the subject-matter of contracts it is interesting to compare a few of the provisions of the Hindu sages respecting loans and deposits with analogous articles of the Civil Code of the Canadian Province of Quebec, which is based upon the Code Napoléon, in its turn an amalgam of Roman and customary law :

Quebec Code, art. 1773. "The lender cannot take back the thing, or disturb the borrower in the proper use of it, until after the expiration of the term agreed upon, or, if there be no agreement, until after the thing has been used for the purpose for which it was borrowed."

Catayayana. "When it is borrowed for a particular purpose, or a specific time, if it be demanded when the purpose is only half accomplished, it shall not be recovered, nor shall the borrower be compelled to restore it."¹¹⁵

Quebec Code, art. 1774. "If before the expiration of the term, or, if no term have been agreed upon, before the borrower has completed his use of the thing, there occur to the lender a pressing and unforeseen need of it, the court may, according to circumstances, oblige the borrower to restore it to him."

Catayayana. "But where the owner's purpose would be disappointed from the want of that thing, the borrower may be compelled to restore it before the time stipulated, even though his purpose be only accomplished in part."¹¹⁶

Quebec Code, art. 1802. "The depositary is bound to apply in the keeping of the thing deposited, the care of a prudent administrator."

Vrihaspati. "Should the bailee suffer the thing bailed to be destroyed by his negligence, while he keeps his own goods with very different care, or should he refuse to restore it on demand, he shall be compelled to pay the value of it with interest."¹¹⁷

Quebec Code, art. 1803. "The depositary has no right to use the thing deposited without the permission of the depositor."

Yajnyawalkya. "If the depositary, of his own accord, without the consent of the owner, use the thing deposited, he shall be amerced, and compelled to pay the price of the thing with interest."¹¹⁸

Quebec Code, art. 1804. "The depositary is bound to restore the identical thing which he has received in deposit."

Manu. "Whatever thing, and in whatever manner, a person shall deposit in the hands of another, the same thing, and in the same manner, ought to be received back by the owner: as the delivery was, so must be the receipt."¹¹⁹

Quebec Code, art. 1805. "The depositary is only held to restore the thing deposited, or such portion as remains, in the condition in which

¹¹³ *Ibid.* bk. 2, ch. 4, § 53.

¹¹⁴ *Ibid.* § 61.

¹¹⁵ *Ibid.* bk. 2, ch. 1, § 43.

¹¹⁶ *Ibid.* § 44.

¹¹⁷ *Ibid.* § 34

¹¹⁸ *Ibid.* § 33.

¹¹⁹ *Ibid.* § 16.

it is at the time of restoration. Deteriorations not caused by his fault fall upon the depositor."

Manu. "If a deposit be seized by thieves, or destroyed by vermin, or washed away by water, or consumed by fire, the bailee shall not be compelled to make it good, unless he took part of it himself."¹²⁰

Quebec Code, art. 1807. "The depositary is bound to restore any profits received by him from the thing deposited."

Vrihaspati. "Whatever depositary procures advantage for himself by the thing bailed, without the consent of the owner, shall be amerced by the king, and made to pay the price of that thing with interest."¹²¹

These are all dispositions of natural law in great part, but it is worthy of notice that the ancient law of India recognized and sanctioned them.

The composition and procedure of the old Hindu Courts "would have surprised Lord Coke," says Mr. Iyer, and in the time of Nareda they appear to have attained a high degree of perfection. In his introduction he states :¹²²

"4. Let the king appoint, as members of a court of justice, honourable men, of tried integrity, who are able to bear, like good bulls, the burden of the administration of justice.

"5. The members of a royal court of justice must be acquainted with the sacred law and with rules of prudence, noble, veracious, and impartial towards friend and foe.

"6. Justice is said to depend on them, and the king is the fountain head of justice."

As regards the duties of the king the same sage states :¹²³

"34. Therefore let a king, after having seated himself on the judgment seat, be equitable towards all beings, discarding selfish interests and acting the part of (Yama) Vaivasvatha (the judge of the dead).

"35. Attending to (the dictates of) the law-book and adhering to the opinion of his chief judge, let him try causes in due order, adhibiting great care."

"37. Avoiding carefully the violation of either the sacred law or the dictates of prudence, he should conduct the trial attentively and skilfully.

"38. As a huntsman traces the vestiges of wounded deer in a thicket by the drops of blood, even so let him trace justice."

With the exception of ordeal the method of proof differed little from that of modern systems. Disputed cases were to be decided by documents in writing, or by oral testimony. "In a suit where proof is deficient, the king must himself decide according to the equal, greater,

¹²⁰ *Ibid.* § 26.

¹²¹ *Ibid.* § 31.

¹²² Pt. 3; 33 *Sacred Books of the East*, 36 et seq.

¹²³ 33 *Sacred Books of the East*, 14.

or less credibility of the parties.”¹²⁴ “Let him fully consider the nature of truth, the state of the case, and of his own person; and, next, the witnesses, the place, the mode, and the time; firmly adhering to all the rules of practice,” says Manu.¹²⁵ In certain cases of a quasi-criminal character where there was not sufficient evidence to enable the king to come to a decision, proof by ordeal (*Dei judicium*) was directed,¹²⁶ and this form of trial, like the penalties of banishment and forfeiture,¹²⁷ was carried to northern Europe by the migrating Aryan tribes and introduced into England by the Saxons. Indeed, throughout the Hindu law we meet practice after practice bearing out the theory of which M. Gibelin is one of the greatest exponents, that as descendants of a common ethnic stock, the Teutons, Greeks and Romans retained many original Aryan customs, and that Indo-Sythe is the true “*patrie du droit*.”

Certain it is that there is no study more interesting or profitable in the whole realm of comparative law than the Sacred Institutes of the Hindus, for as Savigny said of Roman law, they bind our juristic thought on the one side to a magnificent past, and bring us a better knowledge of the principles which still regulate the legal life of vast millions of people with whom we are thereby brought into a connection wholesome both for them and for ourselves.

¹²⁴ *Digest of Hindu Law*, bk. 2, ch. 2, § 52.

¹²⁵ *Ibid.* bk. 2, ch. 4, § 68.

¹²⁶ *Ibid.* bk. 2, ch. 1, § 12. Trial by ordeal was extensively practiced in Scandinavia, and formed part of the law of England until 1215, when it was discontinued in consequence of a decree of the Lateran Council.

¹²⁷ *Ibid.* bk. 3, ch. 2, § 15.